IN THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR KENT COUNTY

PATRICIA BARBER,	:	
	:	C.A. No: 13A-06-001 (RBY)
Appellant,	:	
	:	
v.	:	
	:	
BAYHEALTH MEDICAL CENTER,	:	
	:	
Appellee.	:	

Submitted: December 16, 2013 Decided: January 28, 2014

Upon Consideration of Appellant's Appeal from the Unemployment Insurance Appeal Board AFFIRMED

ORDER

Patricia Barber, Pro se.

James H. McMackin, Esquire, and Allyson Britton DiRocco, Esquire, Morris James, LLP, Wilmington, Delaware for Appellee.

James T. Wakley, Esquire, Deputy Attorney General, Department of Justice, Wilmington, Delaware for Unemployment Insurance Appeal Board.

SUMMARY

This is an appeal from a decision of the Unemployment Insurance Appeal Board ("the Board") denying unemployment benefits to former employee of Bayhealth Medical Center ("Bayhealth"), Patricia Barber ("Appellant"), in connection with the termination of her employment from Bayhealth. First, the Board committed no error of law by denying benefits to Appellant, who filed her appeal five days after the time period for filing an appeal had already expired. Second, the Board committed no error of law by not exercising its limited discretion to accept Appellant's late appeal. Therefore, the decision of the Board is AFFIRMED.

FACTS

Bayhealth employed Appellant from June 27, 2003 through March 1, 2013. Before Bayhealth terminated Appellant's employment, Appellant worked as a Nutritional Care Assistant in the Food & Nutritional Services Department. On March 1, 2013, Bayhealth terminated Appellant's employment for failing to perform her duties, not following the inventory procedures, and failing to follow food safety policies by neglecting to maintain milk in the Bayhealth refrigerators in accordance with Hazard Analysis and Critical Control Points (HACCP) standards. In addition, Bayhealth terminated Appellant's employment on the basis that Appellant caused a patient, with whom she had a personal conflict, to feel threatened when Appellant entered the patient's hospital room to serve her a meal, when she was not directed to do so.

Bayhealth issued two written warnings to the Appellant for failure to comply with the established departmental procedures before the third and final written

C.A. No.: 13A-06-001 (RBY)

January 28, 2014

warning, in lieu of suspension, on October 10, 2012. On March 28, 2012, Bayhealth suspended Appellant for three days for failing to comply with established departmental procedures by not delivering food trays to the patients. As a result of Appellant's negligence in the performance of her assigned duties, several patients' breakfasts were delayed two hours. Bayhealth counseled Appellant that any further occurrences could result in termination. Then, Appellant failed to respond to her supervisors' pages, which caused a delay in the start of the tray line for the lunch meal service. Finally, Appellant's termination occurred on March 1, 2013, for the reasons stated above.

PROCEDURAL POSTURE

Appellant filed an application for unemployment benefits on March 3, 2013, which Bayhealth opposed. Bayhealth submitted the Employer Separation Information Response on March 12, 2013. On March 26, 2013, the Claims Deputy determined that Appellant was discharged for just cause in connection with her work. Appellant was, therefore, disqualified from receiving unemployment benefits pursuant to 19 *Del. C.* § 3314(2). The decision was mailed to Appellant on March 26, 2013. The Claims Deputy's decision became final on April 5, 2013. The decision provided, "the determination becomes final on 04/05/2013 unless a written appeal is filed. Your appeal must be received or postmarked on or before the date indicated." Appellant filed her appeal five days late, on April 10, 2013.

On April 29, 2013, the Appeals Referee conducted a hearing to determine the timeliness of the appeal. Appellant testified that she received the Claims Deputy's determination, but she had an ongoing problem with her mail being

C.A. No.: 13A-06-001 (RBY)

January 28, 2014

delayed, because she previously resided at another address. However, Appellant confirmed that when she filed for unemployment, she provided her new address: 1415 South Hancock Avenue. Appellant could not remember the date that she received the decision; she offered no evidence regarding the date that she received the decision; and she provided no proof of her alleged problems concerning the mail.

The Appeals Referee issued a decision on May 2, 2013, affirming the denial of benefits, since Appellant's appeal was not timely. The Appeals Referee noted that the appeal was statutorily barred by 19 *Del. C.* § 3318(b), which requires that appeals from a Claims Deputy's decision be made within 10 days of mailing. The Appeals Referee also noted that Appellant admitted to having received the notice of determination from the Claims Deputy, and admitted that there was no evidence to suggest a mistake or error by the Department of Labor.

On May 9, 2013, Appellant appealed the decision of the Appeals Referee. On May 22, 2013, the Board held a review of the record below, affirming the decision of the Appeals Referee. On June 7, 2013, Appellant filed a Notice of Appeal with this Court. On October 31, 2013, Appellant submitted her Opening Brief.

STANDARD OF REVIEW

For administrative board appeals, this Court is limited to reviewing whether the Board's decision is supported by substantial evidence and free from legal

4

C.A. No.: 13A-06-001 (RBY)

January 28, 2014

errors.¹ Substantial evidence is that which "a reasonable mind might accept as adequate to support a conclusion." It is "more than a scintilla, but less than preponderance of the evidence." An abuse of discretion will be found if the board "acts arbitrarily or capaciously...exceeds the bounds of reason in view of the circumstances and has ignored recognized rules of law or practice so as to produce injustice." Where an agency has interpreted and applied a statute, the Court's review is *de novo*.⁵ In the absence of an error of law, lack of substantial evidence or abuse of discretion, the Court will not disturb the decision of the board.⁶

DISCUSSION

First, Appellant contends that she worked for Bayhealth for nine years, during which no one raised the issue of expired juices in the refrigerator with her until the day she was terminated. Second, Appellant alleges that other workers were similarly situated, but were not terminated. Third, Appellant argues that the restraining order prohibiting Appellant from having any contact with the patient

¹ 29 Del C. §10142(d); Avon Prods. v. Lamparski, 203 A.2d 559, 560 (Del. 1972).

² Olney v. Cooch, 425 A.2d 610, 614 (Del. Super. 1981) (citing Consolo v. Fed. Mar. Comm'n, 383 U.S. 607, 620 (1966)).

³ *Id.* (quoting *Cross v. Calfano*, 475 F.Supp. 896, 898 (D. Fla. 1979).

⁴ Delaware Transit Corp. v. Roane, 2011 WL 3793450, at *5 (Del. Super. Aug. 24, 2011) (quoting Straley v. Advanced Staffing, Inc., 2009 WL 1228572, at *2 (Del. Super. April 30, 2009).

⁵ Lehman Brothers Bank v. State Bank Commissioner, 937 A.2d 95, 102 (Del. 2007).

⁶ Anchor Motor Freight v. Ciabattoni, 716 A.2d 154, 156 (Del. 1998).

C.A. No.: 13A-06-001 (RBY)

January 28, 2014

with whom she had a personal conflict had expired. Fourth, Appellant asserts that she has not had problems with patients at other times during her employment. Therefore, on appeal, Appellant challenges the facts underlying her termination. Pursuant to 19 *Del. C.* § 3323(a), the findings of the Board as to the facts, if supported by evidence and in the absence of fraud, are conclusive, meaning the jurisdiction of this Court shall be confined to questions of law.⁷

Appellant's contentions above call the Court to weigh the evidence presented at the administrative level. However, this Court's jurisdiction is limited to a determination of whether the Board's decision is supported by substantial evidence and free from legal error. On appeal, the role of the Court is only to determine if there was substantial evidence to support the findings on the administrative level. Thus, the Court declines to consider Appellant's four contentions above in determining whether the Board's decision was proper.

Appellee argues that the Board committed no error of law by denying benefits to Appellant, who filed her appeal five days after the time period for filing an appeal had already expired. 19 *Del. C.* § 3318(b) clearly states that unless a claimant files an appeal within 10 days after the Claims Deputy's determination, the Claims Deputy's decision will be final. In addition, Delaware courts consistently hold that timely appeals are a jurisdictional prerequisite to the

⁷ Delaware Transit Corp. v. Roane, 2011 WL 3793450, at *5.

C.A. No.: 13A-06-001 (RBY)

January 28, 2014

Board's hearing an appeal.⁸ The Claims Deputy's decision was mailed to Appellant at the address she provided to the Department of Labor on March 26, 2013. The Claims Deputy's decision became final on April 5, 2013. However, Appellant did not file her appeal until April 10, 2013, making her appeal five days late. Furthermore, the Department of Labor did not make a mistake in mailing or processing Appellant's paperwork.⁹

Next, Appellee argues that the Board committed no error of law by not exercising its limited discretion to accept Appellant's late appeal. A discretionary action at the administrative level is not an abuse of discretion "unless it is based on 'clearly unreasonable or capricious grounds'" or "the Board exceeds 'the bounds of reason in view of the circumstances and has ignored recognized rules of law or practice so as to produce injustice." Information concerning appeal rights and the deadline to file an appeal were displayed clearly on the Claims Deputy's determination. Furthermore, Appellant offered no evidence or proof of her alleged problems related to her mail. Hence, the Board's refusal to accept Appellant's

⁸ See, e.g. Funk v. Unemployment Ins. Appeal Bd., 591 A.2d 222, 224 (Del. 1991); Pyramid Temp. Servs. v. Ricci, 1994 WL 145989, at *1 (Del. Super 1994); Bailey v. MBNA Am. Bank, N.A., 1991 WL 1304159, at *1-2 (Del. Super. 1991); Manlove v. Sears Fashion Ctr., 1994 WL 710834, at *2 (Del. Super. 1994).

⁹ See *Allen v. J.R. Gettier & Assocs.*, 2002 WL 1463094, at 2* (Del. Super. 2002) (noting the absence of a mistake by the Department of Labor is a ground to affirm when an appeal was filed late).

¹⁰ K-Mart, Inc. v. Bowles, 1995 WL 269872, at *2 (Del. Super. 1995). Absent an abuse of discretion, the Court must affirm the judgment of the Board. Funk, 591 A.2d at 225.

¹¹ See *Funk*, 591 A.2d at 225.

C.A. No.: 13A-06-001 (RBY)

January 28, 2014

appeal five days after the Claims Deputy's decision became final was based on reasonable grounds.

Moreover, Appellant did not present an extraordinary circumstance that might excuse a late appeal. Late appeals may only be excused in extraordinary circumstances.¹² The two such extraordinary circumstances established by case law are instances where an error by the Department of Labor caused the appeal to be late, and instances where the interests of justice present an extraordinary circumstance.¹³ This case presents neither circumstance; thus, the Board also did not abuse its discretion on this ground. Therefore, the Board properly declined to exercise its jurisdiction to allow the late appeal.

CONCLUSION

For the foregoing reasons, the decision of the Board is **AFFIRMED**.

/s/ Robert B. Young

RBY/lmc

oc: Prothonotary

cc: Counsel

Ms. Patricia Barber, Pro se

Opinion Distribution

File

¹² See *Bailey*, 1991 WL 1304159, at *3.

¹³ See *Funk*, 591 A.2d at 225; see also *Bailey*, 1991 WL 1304159, at *2; *Manlove*, 1994 WL 710834, at *2; *Martin v. Unemployment Insurance Appeal Bd.*, 2004 WL 772073, at *3 (Del. Super. 2004); *Hartman v. Unemployment Insurance Appeal Bd.*, 2004 WL 772067, at *3 (Del. Super. 2004).